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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

RECEIVED
COURT OF CRIMINAL APPEALS
12/11/2017
DEANA WILLIAMSON, CLERK

JOSE OLIVA, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Harris County

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STATE PROSECUTING ATTORNEY'S
POST-SUBMISSION AMICUS BRIEF

* * * * *

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* * * * *

STATE PROSECUTING ATTORNEY'S
POST-SUBMISSION AMICUS BRIEF[1]

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney submits this post-submission amicus brief to further explain the issue already briefed by the parties and to clarify or answer some of the inquires raised during oral argument. The State Prosecuting Attorney

[1] As the State Prosecuting Attorney, there is no fee attached to this filing. TEX. R. APP. P. 11.

ultimately agrees with the parties that TEX. PENAL CODE § 49.09(a) is an elemental offense enhancer. However, because the prior DWI was proven at punishment, the error here is properly categorized as harmless, non-constitutional error.

1. United States Constitutional Requirements.

There is no federal constitutional right to have a jury assess punishment. *Tinney v. State*, 578 S.W.2d 137, 138 (Tex. Crim. App. 1979). Likewise, this Court previously observed, "Long prior to the adoption of the bifurcated trial procedure in criminal cases (Article 37.07 . . .), this court held that Article I, § 15, of the Texas Constitution did not preclude the Legislature from providing that the jury shall only pass on the question of guilt or innocence and that punishment shall be assessed by the court." *Bullard v. State*, 548 S.W.2d 13, 17 (Tex. Crim. App. 1977) (citing *Ex parte Marshall*, 161 S.W. 112, 113-14 (1913)).

However, the Supreme Court has held that, other than the fact of a prior conviction, any fact that increases the penalty beyond the statutory maximum must be submitted to a jury (unless waived) and proven beyond a reasonable doubt.[2]

[2] The statutory maximum means the "maximum sentence a judge may impose solely on the basis of facts in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004); *see also United States v. Booker*, 543 U.S. 220, 223 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Therefore, the presence of a non-habitual enhancement in a sentencing statute does not relieve the State of its burden or circumvent the need for a jury finding. *Id.* at 496.

Next, there is no constitutional right to bifurcated guilt and punishment proceedings. In *Spencer v. Texas*, the United States Supreme Court rejected the argument that due process is violated when prior convictions are admitted under habitual offender statutes during a unitary proceeding. 385 U.S. 554, 564-69 (1967). Recognizing that the admission of priors before a jury deciding guilt can be prejudicial, even with a limiting instruction, *id*. at 562-63, the Court nevertheless opined:

> To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment.

Id. at 568.

In sum, federal constitutional law defines the outer limits on procedure and substance for determining guilt and punishment. To support a guilty verdict, a jury must find the essential elements of an offense beyond a reasonable doubt. The jury must also find, beyond a reasonable doubt, any fact, save a prior conviction, that increases the punishment range. And the jury may make these findings in a unitary

or bifurcated proceeding.

2. Bifurcation is a Texas Statutory Requirement.

Texas' bifurcation statutes were enacted in 1966. TEX. CODE CRIM. PROC. arts. 37.07, 37.071; Acts 1965, 59th Leg., ch. 722, § 1, eff. Jan. 1966. Bifurcation was "'designed to take the blindfolds off the judge or jury when it came to assessing punishment. It authorized the introduction of evidence on punishment not heretofore held to be generally admissible.'" *Sims v. State*, 273 S.W.3d 291, 294 (Tex. Crim. App. 2008) (quoting *Brumfield v. State*, 445 S.W.2d 732, 738 (Tex. Crim. App. 1969)). Entitlement to bifurcated proceedings applies only when the defendant pleads not guilty. *In re State ex. rel. Tharp*, 393 S.W.3d 751, 754-55 (Tex. Crim. App. 2012). But the defendant may waive his right to a jury trial, with the consent of the State, as to guilt and punishment or only punishment by electing to have a judge. TEX. CODE CRIM. PROC. art. 37.07 § 2(b).

Upon a guilty plea, the defendant is entitled to a jury trial on punishment unless that right is waived. *In re State ex. rel. Tharp*, 393 S.W.3d at 755; *see also Ex parte Pete*, 517 S.W.3d 825, 831-32 (Tex. Crim. App. 2017) (discussing entitlement to the "same" jury on guilt and punishment). And, regardless of the factfinder for punishment—jury or judge—the trial on a guilty plea is a unitary proceeding. *In re State ex. rel. Tharp*, 393 S.W.3d at 756-57. "A plea of guilty to a jury eliminates guilt

as an issue to be determined and makes it 'proper for the trial judge to instruct the jury to return a verdict of guilty, charge the jury on the law as to the punishment issues and then instruct them to decide only those issues.'" *Id*. at 757 (quoting *Holland v. State*, 761 S.W.2d 307, 313 (Tex. Crim. App. 1988)).

3. TEX. PENAL CODE § 49.09(a)'s Purpose is Determined by Classifications of Crimes and the Order of Trial.

The plain language in TEX. PENAL CODE § 49.09(a)—"an offense under . . . is a Class A misdemeanor, . . ., if it is shown on the trial of an offense that the person has previously been convicted one time . . . ."—establishes that it is an offense enhancing statute. *See Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (courts are prohibited from looking beyond the plain text unless it is ambiguous or its plain meaning would lead to an absurd result that the Legislature could not have intended). This is because it is determinative of how offenses are classified—misdemeanors and felonies—in terms of degree. TEX. PENAL CODE §§ 12.02-04, 12.21-31. Each offense classification statute that proscribes a punishment range begins with "an individual adjudicated guilty of a ___," "felony in the first degree," or "Class A misdemeanor," however the case may be. TEX. PENAL CODE §§ 12.21-23, 12.32-35. Offense classification is therefore tied to an adjudication of "guilt." And a guilty finding precedes any punishment determination. *See* TEX. CODE CRIM. PROC. art. 36.01(8) ("In the event of a finding of guilty, the trial shall then

proceed as set forth in Article 37.07."); TEX. CODE CRIM. PROC. art. 37.07 § 2 (in criminal cases, except Class C misdemeanors, *see* TEX. CODE CRIM. PROC. art. 4.11(a), "the judge shall . . . first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment . . . ."). The interrelationship of the statutory scheme for offense classification and those dictating the order of trial demonstrate that Section 49.09(a) is properly construed as an offense enhancer. The Legislature has therefore determined at which phase of trial the issue is be litigated when the proceedings are bifurcated.

As an offense enhancer, the State bears the burden of proof. However, unlike the elements comprising the primary offense of DWI, the elements attached to the burden of proof for a prior conviction are different. Instead of proving the elements of the prior DWI, the State must prove, beyond a reasonable doubt, that the prior conviction exists, is available for enhancement, and that the defendant is linked to it. *See Flowers v. State*, 220 S.W.3d 919, 921-22 (Tex. Crim. App. 2007). The defendant may stipulate to the existence of a prior, thereby relieving the State of the obligation to prove it, but the jury may be informed of the stipulation. *Hollen v. State*, 117 S.W.3d 798, 802 (Tex. Crim. App. 2003). Any foreseen prejudice can be ameliorated with a limiting instruction.

4. Construing Statutes as an Offense Enhancer is Consistent with Other Offense Specific Provisions and the General State-Jail-Felony Enhancement Scheme.

A. "Shown on the Trial of an Offense" is an Elemental Offense Enhancer.

Taking into account the fact that guilt must be determined before punishment, whether in a bifurcated or unitary proceeding, these statutes establish that the Legislature has created separate, independent schemes for enhancing offenses and punishment, even within offense-specific provisions. The phrase "shown on the trial of an offense" when paired with language directed at offense classification has acquired a technical meaning apart from punishment enhancement. In addition to TEX. PENAL CODE § 49.09(a), the phrase is used in over twenty other criminal law statutes to define true elemental offense enhancements. *See* Appendix A. Notably, a few of those statutes use recidivist offense enhancements in addition to factual element offense enhancements. *See* Appendix A (Claiming Lottery Prize by Fraud, Driving While License Invalid, Racing on Highway, Restrictions on Airbags).

B. "Shown on the Trial of an Offense" has a Specific Meaning for State-Jail-Felony-Punishment Enhancement.

The phrase "shown on the trial of an offense" also has a technical meaning integral to Penal Code Chapter 12's general punishment enhancement statutes. It is pertinent to how offenses are classified—misdemeanors and felonies—in terms of degree. TEX. PENAL CODE §§ 12.02-04, 12.21-31. In turn, the applicable

punishment, the minimum, in addition to punishment enhancements, are frequently assessed according to a detailed and complicated scheme. For example, "shown on the trial of an offense" in TEX. PENAL CODE § 12.42(d) precludes the habitual enhancement of an offense that had been a state jail felony under TEX. PENAL CODE § 12.35(a) at the guilt phase. *State v. Webb*, 12 S.W.3d 808, 811-12 (Tex. Crim. App. 2000). Construing the relevant phrase differently for purposes of this case would undermine the operation of the general Chapter 12 enhancement scheme understood and used by the bench and bar daily.

5. No Community Supervision, Parole, and Mandatory Supervision Impact.

A review of the community supervision, parole, and mandatory supervision statutes shows that none are affected by this type of elemental classification as the criminal offenses are defined at this time. TEX. CODE CRIM. PROC. arts. 42A.054-56, 42A.101-03; TEX. GOV'T CODE §§ 508.145, 508.147, 508.149. So construing this type of provision either way will not impact eligibility under those statutes.

6. Traditionally Available Remedies on Direct Appeal and Habeas.

If Section 49.09(a) is treated as an offense enhancement, and the evidence were found insufficient on direct appeal from a bifurcated jury trial, the traditional remedy would be to reform the conviction to the lesser Class B misdemeanor and remand for a new punishment hearing. *Bowen v. State*, 374 S.W.3d 427, 432 (Tex. Crim. App.

2012). *But see Barefiled v. State*, 63 S.W.3d 446, 451 (Tex. Crim. App. 2001) (evidence sufficient when it was admitted at punishment of an improperly bifurcated bench trial). On habeas, as a guilt issue, the defendant would be deemed actually innocent of the higher offense level; therefore, the judgment will be reformed and the case will be remanded for a new punishment hearing. *State v. Wilson*, 324 S.W.3d 595, 589-99 (Tex. Crim. App. 2010). If it were solely a punishment issue, the defendant would be entitled to a new punishment hearing, and the State would be given a second opportunity to prove the prior offense. *See Monge v. California*, 524 U.S. 721, 734 (1998) (when the evidence failed to prove the existence of an enhancement, the Double Jeopardy Clause does not bar the use of the enhancement conviction during a retrial on punishment). On habeas, relief would be granted based on the fact that the sentence is illegal. *Ex parte Roemer*, 215 S.W.3d 887, 890-91 (Tex. Crim. App. 2017).

7. This is Harmless Statutory Error Involving Timing, Not a Total Failure on Proof.

The traditional form of relief for insufficient evidence should not be applied in this case. Though sufficiency amounts to reversible error, *see Burks v. United State*, 437 U.S. 1, 15 (1978), the error here is properly categorized as non-constitutional trial error. *See* TEX. R. APP. P. 44.2(b). Bifurcation, which governs timing, is a state statutory creation, and due process is not implicated because there

is no total failure of proof. *See Flowers*, 220 S.W.3d at 923 (existence of a prior and link to defendant must be proven beyond a reasonable doubt). The error here should be found harmless because the State did prove the prior DWI offense at punishment. *Cf. Ex parte Parrott*, 396 S.W.3d 531, 536-37 (Tex. Crim. App. 2013) (unlawful enhancement was not harmful where the habeas record showed that other prior convictions were available at the time); *see also Wright v. State*, 506 S.W.3d 478, 482 (Tex. Crim. App. 2016) (habeas cognizability on appeal from revocation was not established because harm under *Parrott* could not be shown). The error here is one of timing not insufficiency. *Compare with Jordan v. State*, 256 S.W.3d 286, 292 (Tex. Crim. App. 2008) (failure to prove sequence for habitual enhancement under TEX. PENAL CODE § 12.42(d) will never be harmless on direct appeal); *see also Baldwin v. Blackburn*, 653 F.2d 942, 951 (5th Cir. 1981) ("we fail to see how the fact that instructions on aggravated circumstances were given in the wrong step of a bifurcated guilt/sentencing procedure proved unfair to the defendant."). Reforming the judgment and granting a new punishment hearing would only serve to remedy a fictional, theoretical harm.

PRAYER FOR RELIEF

The State Prosecuting Attorney prays that this Court hold that TEX. PENAL CODE § 49.09(a) is a habitual offense enhancer that, by statute in a bifurcated proceeding, must be proven to be the defendant's beyond a reasonable doubt. Further, it is urged that Court hold that the statutory error here, relating to only timing, not sufficiency, be declared harmless because the prior was established during punishment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,250 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State Prosecuting Attorney's Post-Submission Amicus Brief has been served on December 11, 2017, *via* email or certified electronic service provider to:

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Appendix A

TEX. FAMILY CODE § 261.109 Failure to Report	(b) An offense under Subsection (a) is a Class A misdemeanor, except that the offense is a state jail felony if it is *shown on the trial of the offense* that the child was a person with an intellectual disability who resided in a state supported living center, the ICF-IID component of the Rio Grande State Center, or a facility licensed under Chapter 252, Health and Safety Code, and the actor knew that the child had suffered serious bodily injury as a result of the abuse or neglect.
TEX. GOV'T CODE § 466.306 Forgery; Alteration of Ticket	(b) An offense under this section is a felony of the third degree unless it is *shown on the trial of the offense* that the prize alleged to be authorized by the ticket forged or altered is greater than $10,000, in which event the offense is a felony of the second degree.
TEX. GOV'T CODE § 466.307 Influencing Selection of Winner	(b) An offense under this section is a felony of the third degree unless it is *shown on the trial of the offense* that a prize in the game influenced or attempted to be influenced is greater than $10,000, in which event the offense is a felony of the second degree.
TEX. GOV'T CODE § 466.308 Claiming Lottery Prize by Fraud	(c) An offense under this section is a Class A misdemeanor unless it is *shown on the trial of the offense* that: (1) the amount claimed is greater than $200 but not more than $10,000, in which event the offense is a felony of the third degree; (2) the amount claimed is greater than $10,000, in which event the offense is a felony of the second degree; or (3) the person has previously been convicted of an offense under Section 466.306, 466.307, 466.309, 466.310, or this section, in which event the offense is a felony of the third degree, unless the offense is designated as a felony of the second degree under Subdivision (2).
TEX. NAT. RES. CODE § 151.052 Criminal Offense	(b) An offense under this section is: (1) a state jail felony if it is *shown on the trial of the offense* that the value of the timber harvested is at least $500 but less than $20,000; (2) a felony of the third degree if it is *shown on the trial of the offense* that the value of the timber harvested is at least $20,000 but less than $100,000; (3) a felony of the second degree if it *is shown on the trial of the offense* that the value of the timber harvested is at least $100,000 but less than $200,000; or (4) a felony of the first degree if *it is shown on the trial of the offense* that the value of the timber harvested is at least $200,000.

TEX. NAT. RES. CODE § 151.105 Offense	(d) An offense under this section is: (1) a state jail felony if it is *shown on the trial of the offense* that the value of the timber sold is at least $500 but less than $20,000; (2) a felony of the third degree if it is *shown on the trial of the offense* that the value of the timber sold is at least $20,000 but less than $100,000; (3) a felony of the second degree if it is *shown on the trial of the offense* that the value of the timber sold is at least $100,000 but less than $200,000; or (4) a felony of the first degree if it is *shown on the trial of the offense* that the value of the timber sold is at least $200,000.
TEX. OCC. CODE § 901.602 Criminal Penalty	(b) Except as otherwise provided by this subsection, an offense under this section is a Class B misdemeanor. An offense under this section that involves intentional fraud is punishable as: (1) a state jail felony if it is *shown on the trial of the offense* that the violation resulted in a monetary loss of less than $10,000 or did not result in a monetary loss; (2) a felony of the third degree if it is *shown on the trial of the offense* that the violation resulted in a monetary loss of at least $10,000 but less than $100,000; or (3) a felony of the second degree if it is *shown on the trial of the offense* that the violation resulted in a monetary loss of at least $100,000.
TEX. PENAL CODE § 15.031 Smuggling of Persons	(e) An offense under this section is one category lower than the solicited offense, except that an offense under this section is the same category as the solicited offense if it is *shown on the trial of the offense* that the actor: (1) was at the time of the offense 17 years of age or older and a member of a criminal street gang, as defined by Section 71.01; and (2) committed the offense with the intent to: (A) further the criminal activities of the criminal street gang; or (B) avoid detection as a member of a criminal street gang.
TEX. PENAL CODE § 20.05 Continuos Smuggling of Persons	(2) a felony of the first degree if: (A) it is *shown on the trial of the offense* that, as a direct result of the commission of the offense, the smuggled individual became a victim of sexual assault, as defined by Section 22.011, or aggravated sexual assault, as defined by Section 22.021; or (B) the smuggled individual suffered serious bodily injury or death.

TEX. PENAL CODE § 25.04 Enticing a Child	(b) An offense under this section is a Class B misdemeanor, unless it is *shown on the trial of the offense* that the actor intended to commit a felony against the child, in which event an offense under this section is a felony of the third degree.
TEX. PENAL CODE § 28.02 Arson	(d) An offense under Subsection (a) is a felony of the second degree, except that the offense is a felony of the first degree if it is *shown on the trial of the offense* that: (1) bodily injury or death was suffered by any person by reason of the commission of the offense; or (2) the property intended to be damaged or destroyed by the actor was a habitation or a place of assembly or worship. (e) An offense under Subsection (a-1) is a state jail felony, except that the offense is a felony of the third degree if it is *shown on the trial of the offense* that bodily injury or death was suffered by any person by reason of the commission of the offense.
TEX. PENAL CODE § 32.31 Credit Card or Debit Card Abuse	(d) An offense under this section is a state jail felony, except that the offense is a felony of the third degree if it is *shown on the trial of the offense* that the offense was committed against an elderly individual as defined by Section 22.04.

TEX. PENAL CODE § 33.023 Electronic Data Tampering	(d-1) Subject to Subsection (d-2), if it is *shown on the trial of the offense* that the defendant acted with the intent to defraud or harm another, an offense under this section is: (1) a Class C misdemeanor if the aggregate amount involved is less than $100 or cannot be determined; (2) a Class B misdemeanor if the aggregate amount involved is $100 or more but less than $750; (3) a Class A misdemeanor if the aggregate amount involved is $750 or more but less than $2,500; (4) a state jail felony if the aggregate amount involved is $2,500 or more but less than $30,000; (5) a felony of the third degree if the aggregate amount involved is $30,000 or more but less than $150,000; (6) a felony of the second degree if the aggregate amount involved is $150,000 or more but less than $300,000; and (7) a felony of the first degree if the aggregate amount involved is $300,000 or more. (d-2) If it is *shown on the trial of the offense* that the defendant knowingly restricted a victim's access to privileged information, an offense under this section is: (1) a state jail felony if the value of the aggregate amount involved is less than $2,500; (2) a felony of the third degree if: (A) the value of the aggregate amount involved is $2,500 or more but less than $30,000; or (B) a client or patient of a victim suffered harm attributable to the offense; (3) a felony of the second degree if: (A) the value of the aggregate amount involved is $30,000 or more but less than $150,000; or (B) a client or patient of a victim suffered bodily injury attributable to the offense; and (4) a felony of the first degree if: (A) the value of the aggregate amount involved is $150,000 or more; or (B) a client or patient of a victim suffered serious bodily injury or death attributable to the offense.

TEX. PENAL CODE § 33.024 Unlawful Decryption	(b-1) Subject to Subsection (b-2), if it is *shown on the trial of the offense* that the defendant acted with the intent to defraud or harm another, an offense under this section is: (1) a Class C misdemeanor if the value of the aggregate amount involved is less than $100 or cannot be determined; (2) a Class B misdemeanor if the value of the aggregate amount involved is $100 or more but less than $750; (3) a Class A misdemeanor if the value of the aggregate amount involved is $750 or more but less than $2,500; (4) a state jail felony if the value of the aggregate amount involved is $2,500 or more but less than $30,000; (5) a felony of the third degree if the value of the aggregate amount involved is $30,000 or more but less than $150,000; (6) a felony of the second degree if the value of the aggregate amount involved is $150,000 or more but less than $300,000; and (7) a felony of the first degree if the value of the aggregate amount involved is $300,000 or more. (b-2) If it is *shown on the trial of the offense* that the defendant knowingly decrypted privileged information, an offense under this section is: (1) a state jail felony if the value of the aggregate amount involved is less than $2,500; (2) a felony of the third degree if: (A) the value of the aggregate amount involved is $2,500 or more but less than $30,000; or (B) a client or patient of a victim suffered harm attributable to the offense; (3) a felony of the second degree if: (A) the value of the aggregate amount involved is $30,000 or more but less than $150,000; or (B) a client or patient of a victim suffered bodily injury attributable to the offense; and (4) a felony of the first degree if: (A) the value of the aggregate amount involved is $150,000 or more; or (B) a client or patient of a victim suffered serious bodily injury or death attributable to the offense.

TEX. PENAL CODE § 35A.02 Medicaid Fraud	(4) a state jail felony if: (A) the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is $2,500 or more but less than $30,000; (B) the offense is committed under Subsection (a)(11); or (C) it is *shown on the trial of the offense* that the amount of the payment or value of the benefit described by this subsection cannot be reasonably ascertained; (5) a felony of the third degree if: (A) the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is $30,000 or more but less than $150,000; or (B) it is *shown on the trial of the offense* that the defendant submitted more than 25 but fewer than 50 fraudulent claims under the Medicaid program and the submission of each claim constitutes conduct prohibited by Subsection (a); (6) a felony of the second degree if: (A) the amount of any payment or the value of any monetary or in-kind benefit provided or claim for payment made under the Medicaid program, directly or indirectly, as a result of the conduct is $150,000 or more but less than $300,000; or (B) it is *shown on the trial of the offense* that the defendant submitted 50 or more fraudulent claims under the Medicaid program and the submission of each claim constitutes conduct prohibited by Subsection (a); or

TEX. PENAL CODE § 37.10 Tampering with a Governmental Record	(2) An offense under this section is a felony of the third degree if it is *shown on the trial of the offense* that the governmental record was: (A) a public school record, report, or assessment instrument required under Chapter 39, Education Code, data reported for a school district or open-enrollment charter school to the Texas Education Agency through the Public Education Information Management System (PEIMS) described by Section 42.006, Education Code, under a law or rule requiring that reporting, or a license, certificate, permit, seal, title, letter of patent, or similar document issued by government, by another state, or by the United States, unless the actor's intent is to defraud or harm another, in which event the offense is a felony of the second degree; (B) a written report of a medical, chemical, toxicological, ballistic, or other expert examination or test performed on physical evidence for the purpose of determining the connection or relevance of the evidence to a criminal action; (C) a written report of the certification, inspection, or maintenance record of an instrument, apparatus, implement, machine, or other similar device used in the course of an examination or test performed on physical evidence for the purpose of determining the connection or relevance of the evidence to a criminal action; or (D) a search warrant issued by a magistrate. (3) An offense under this section is a Class C misdemeanor if it is *shown on the trial of the offense* that the governmental record is a governmental record that is required for enrollment of a student in a school district and was used by the actor to establish the residency of the student. (4) An offense under this section is a Class B misdemeanor if it is *shown on the trial of the offense* that the governmental record is a written appraisal filed with an appraisal review board under Section 41.43(a-1), Tax Code, that was performed by a person who had a contingency interest in the outcome of the appraisal review board hearing. (d) An offense under this section, if it is *shown on the trial of the offense* that the governmental record is described by Section 37.01(2)(D), is: (1) a Class B misdemeanor if the offense is committed under Subsection (a)(2) or Subsection (a)(5) and the defendant is convicted of presenting or using the record; (2) a felony of the third degree if the offense is committed under: (A) Subsection (a)(1), (3), (4), or (6); or (B) Subsection (a)(2) or (5) and the defendant is convicted of making the record; and (3) a felony of the second degree, notwithstanding

TEX. PENAL CODE § 37.10 Interference with Public Duties	(d-1) Except as provided by Subsection (d-2), in a prosecution for an offense under Subsection (a)(1), there is a rebuttable presumption that the actor interferes with a peace officer if it is *shown on the trial of the offense* that the actor intentionally disseminated the home address, home telephone number, emergency contact information, or social security number of the officer or a family member of the officer or any other information that is specifically described by Section 552.117(a), Government Code.
TEX. PENAL CODE § 46.14 Firearm Smuggling	(b) An offense under this section is a felony of the third degree, unless it is *shown on the trial of the offense* that the offense was committed with respect to three or more firearms in a single criminal episode, in which event the offense is a felony of the second degree.
TEX. TRANSP. CODE § 21.071 Painting or Marking Requirements for Certain Meteorological Evaluation Towers; Offense	(d) A person who owns, operates, or erects a meteorological evaluation tower in violation of this section commits an offense. An offense under this subsection is a Class C misdemeanor, except that the offense is a Class B misdemeanor if it is *shown on the trial of the offense* that as a result of the commission of the offense a collision with the meteorological evaluation tower occurred causing bodily injury or death to another person.
TEX. TRANSP. CODE § 521.457 Driving While License Invalid	f) An offense under this section is a Class B misdemeanor if it is *shown on the trial of the offense* that the person: (1) has previously been convicted of an offense under this section or an offense under Section 601.371(a), as that law existed before September 1, 2003; or (2) *at the time of the offense, was operating the motor vehicle in violation of Section 601.191.*

TEX. TRANSP. CODE § 545.420 Racing on Highway	(e) An offense under Subsection (a) is a Class A misdemeanor if it is *shown on the trial of the offense* that: (1) the person has previously been convicted one time of an offense under that subsection; or (2) the person, at the time of the offense: (A) was operating the vehicle while intoxicated, as defined by Section 49.01, Penal Code; or (B) was in possession of an open container, as defined by Section 49.031, Penal Code. (f) An offense under Subsection (a) is a state jail felony if it is shown on the trial of the offense that the person has previously been convicted two times of an offense under that subsection. *(*g) An offense under Subsection (a) is a felony of the third degree if it is *shown on the trial of the offense* that as a result of the offense, an individual suffered bodily injury. (h) An offense under Subsection (a) is a felony of the second degree if it is *shown on the trial of the offense* that as a result of the offense, an individual suffered serious bodily injury or death.
TEX. TRANSP. CODE § 547.614 Restrictions on Airbags	(c) An offense under this section is a felony of the third degree if it is shown on the trial of the offense that the defendant has been previously convicted of an offense under this section. (d) An offense under this section is a felony of the second degree if it is *shown on the trial of the offense* that as a result of the offense an individual suffered bodily injury. (e) An offense under this section is a felony of the first degree if it is *shown on the trial of the offense* that the offense resulted in the death of a person.
TEX. TRANSP. CODE § 644.151 Criminal Offense	(b-1) An offense under Subsection (a)(3) is a Class A misdemeanor, except that the offense is: (1) a state jail felony if it is *shown on the trial of the offense* that at the time of the offense the commercial motor vehicle was involved in a motor vehicle accident that resulted in bodily injury; or (2) a felony of the second degree if it is *shown on the trial of the offense* that at the time of the offense the commercial motor vehicle was involved in a motor vehicle accident that resulted in the death of a person.